



WESTFIELD-WASHINGTON
BOARD OF ZONING APPEALS

October 13, 2015

1503-VU-02

Exhibit 1

Petition Number: 1503-VU-02

Subject Site Address: 17777 Commerce Drive (the "Property")

Petitioner: Edward T. Tomich by Badger Engineering, LLC (the "Petitioner")

Request: The petitioner is requesting a modification of a condition of approval for a previously granted Variance of Use (1304-VU-01) to allow an indoor shooting range and related retail sales in the EI: Enclosed Industrial District (Chapter 13: Use Table).

Current Zoning: EI: Enclosed Industrial District

Current Land Use: Indoor Shooting Range

Approximate Acreage: 1.38 acres +/-

Exhibits:

1. Staff Report
2. Aerial Location Map
3. Existing Conditions Exhibit
4. Petitioner's Application
5. Acknowledgement of Variance
6. Public Hearing Minutes (04/09/13)
7. Public Hearing Minutes (03/10/15)
8. Continuance Request Letter (04/14/15)
9. Continuance Request Letter (05/12/15)
10. Petitioner's Update (08/11/15)
11. Continuance Request Letter (09/15/15)
12. Petitioner's Modified Request (10/13/15)

Staff Reviewer: Jesse M. Pohlman, Senior Planner

PROPERTY INFORMATION

The subject property is 1.38 acres +/- in size and is located on the east side of Commerce Drive; approximately one thousand (1,000) feet north of State Highway 32 (see [Exhibit 2](#)). The Property is zoned EI: Enclosed Industrial District. The property is located within an existing enclosed industrial park, surrounded by existing structures and businesses to the north, west and south. The property to the east is a large field currently undeveloped, but also currently zoned Enclosed Industrial.



CONDITION MODIFICATION HISTORY

March 10, 2015: This petition received a public hearing at the March 10, 2015, Board meeting (see Exhibit 8) and was continued by the Board.

April 14, 2015: The petition was continued from the April 14, 2015, Board meeting at the request of the petitioner to allow the petitioner to “continue to engage in an ongoing effort to address the issues and concerns” and that “the requested additional time is paramount importance to meaningfully address these issues.”

May 12, 2015: The petition was continued from the May 12, 2015, Board meeting at the request of the petitioner to allow the petitioner to “complete the work in progress and to continue to engage in an ongoing effort to address these sound-related issues” and “to schedule a meeting with the adjacent property owners...to conduct sound testing in the presence of all stakeholders.”

May 29, 2015: The petitioner and adjacent property owner, including their legal representatives and sound consultants, performed a coordinated sound test along the north property line following the completion of the work outlined in the May 12, 2015, continuance letter. The Department (Jesse Pohlman and Amanda Rubadue) was present during this testing.

June 9, 2015: The petition was continued from the June 9, 2015, Board meeting at the request of the petitioner following an update presentation by the petitioner regarding the improvements made to date and the subsequent sound test. The continuance will allow the petitioner to file a request for a variance of development standard for the setback along the north property to accommodate the petitioner’s proposed improvements to construct a vestibule.

July 14, 2015: The Board approved a Variance of Development Standard (1507-VS-09) for a reduction in the side yard setback along the north property line to allow the construction of the proposed vestibule. This petition was then continued from the July 14, 2015, Board meeting at the request of the petitioner to allow for the construction of the vestibule.

August 11, 2015: The petition was continued from the August 11, 2015, Board meeting following an update presentation by the petitioner that included obtaining the applicable approvals and permits by the State and City for the construction of the vestibule and the installation of the erosion control to begin construction.

September 15, 2015: The petition was continued from the September 15, 2015, Board meeting following a “final request” to continue by the petitioner. The petitioner presented an update of the partially constructed vestibule and that the construction would be completed by the October 13, 2015, Board meeting.



October 5, 2015: The petitioner and adjacent property owner, including their legal representatives and sound consultants, performed a coordinated sound test following the completion of the construction of the vestibule. The Department (Jesse Pohlman and Kevin Todd) was present during this testing.

PROPERTY HISTORY

Variance of Use: On April 9, 2013, the Board of Zoning Appeals approved a Variance of Use (1304-VU-01) with conditions, as further described herein, for the Property to allow an indoor shooting range and related retail sales (collectively, the "Shooting Academy").

Development Plan: On June 17, 2013, the Plan Commission approved the development plan (1306-DP-09) and site plan (1306-SIT-06) for the Property to allow for the construction of the Shooting Academy.

Improvement Location Permit: On August 16, 2013, the City issued the building permit to begin construction. The building was issued a temporary Certificate of Occupancy on December 30, 2013, (subject to final installation of the required landscaping) to begin operating, with the final Certificate of Occupancy issued on April 22, 2014. The existing conditions, following the construction of the vestibule, are depicted on the attached Exhibit 3.

ANALYSIS

Issue: This petition request is the result of an existing violation (EN-15-01-02) on the Property. The violation, related to sound and as further detailed herein, was brought to the Department's attention by neighbors on December 3, 2014. The Department inspected the Property and contacted the Petitioner on December 9, 2014, regarding the concern. The Petitioner subsequently made improvements to the interior of the Shooting Academy in an attempt to bring the Property into compliance. The Department inspected the Property again on January 14, 2015, and determined that even upon completing those improvements, the Shooting Academy's sound level was still in violation.

The Department formally cited the Petitioner of the violation on January 15, 2015. The citation required the Petitioner to bring the Property into compliance with the Conditions of Approval, detailed below, or to file a modification of the Conditions of Approval. As a result, the Petitioner filed this petition (see Exhibit 4) to modify the Conditions of Approval.

Conditions of Approval: The Shooting Academy was approved by the Board of Zoning Appeals with the following conditions (the "Conditions of Approval"), as memorialized in the



Acknowledgment of Variance recorded as Instrument No. 2013023701 on April 17, 2013, in the Hamilton County Recorder's Office (see Exhibit 5):

1. The Petitioner shall record an Acknowledgement of Variance with the Hamilton County Recorder's Office and return a copy of the recorded instrument to the Economic and Community Development Department prior to the issuance of a building permit for the Property.
2. The "Indoor Shooting Range and related Retail Sales" use (collectively, the "Shooting Academy") shall be limited in scope and operation to the Petitioner's Narrative and Preliminary Plans. Any expansion or substantial alteration to the scope and operation of the Shooting Academy, as determined by the Director, shall require approval by the Board.
3. The Shooting Academy shall be developed and operated in substantial compliance to the Petitioner's Narrative and Preliminary Plans, subject to review and approval for compliance with applicable ordinances and laws of the development plans and appropriate permits.
4. The Shooting Academy shall comply with the Westfield-Washington Township Zoning Ordinance's Performance Standards for Industrial Districts, as amended.
5. The Shooting Academy shall comply with Indiana Fire and Building Codes, as amended.

The third condition reads "[t]he Shooting Academy shall be developed and operated in substantial compliance to the Petitioner's Narrative."

Petitioner's Narrative (Exhibit B of the Acknowledgement of Variance) states: "The range area will be constructed with 10" thick concrete walls and a 4" concrete slab. The ceiling will have bullet-proof panels and baffles. This will prevent any stray bullets as well as sound from leaving the building."

In addition, during the April 9, 2013, Board of Zoning Appeals public hearing, the Petitioner's attorney presented that the use includes "a fully enclosed building with ten inch-thick reinforced concrete walls and a baffling system up above and a bullet capture system that simply will not allow anything to escape the building. It's physically impossible. The architect and engineer for the project...is also here and is available to answer any questions in terms of the structure and how it is designed to keep both sound and rounds of ammunition within the structure ...¹."

Unified Development Ordinance: The fourth condition reads "[t]he Shooting Academy shall comply with the Westfield-Washington Township Zoning Ordinance's Performance Standards for

¹ Recorded audio of April 9, 2013, Board of Zoning Appeals meeting (time mark of 55:30 +/-).



Industrial Districts, as amended. The following are standards from the zoning ordinance, with regard to noise²:

Article 6.15(B)(4) Performance Standards; General Requirements; Noise: No use shall produce noise in such a manner as to be objectionable because of volume, frequency, intermittence, beat, shrillness or vibration. Said noise shall be muffled or otherwise controlled so as not to become detrimental, provided, however, public safety sirens and related apparatus used solely for public purposes shall be exempt from this standard.

Article 6.15(C)(8) Performance Standards; Industrial Uses; Noise; Enclosed Industrial: At no point one hundred and twenty-five (125) feet from the boundary of an EI: Enclosed Industrial District, or any district which permits an enclosed Industrial Use, shall the sound pressure level of any operation or plant (other than background noises produced by sources not under the control of this Article) exceed the decibel limits in the Octave Bands designated below:

CHART: MAXIMUM PERMITTED SOUND LEVELS FOR ENCLOSED INDUSTRIAL

Octave Band Frequency Cycles per Second	Max. Sound Level 125' from Adjoining Residential District Boundary	Max. Sound Level 125' from Adjoining Business District Boundary
0 to 75	75 decibels	80 decibels
76 to 150	70 decibels	75 decibels
151 to 300	65 decibels	70 decibels
301 to 600	59 decibels	64 decibels
601 to 1200	53 decibels	58 decibels
1201 to 2400	48 decibels	53 decibels
2401 to 4800	48 decibels	49 decibels
Above 4800	41 decibels	46 decibels

City's Municipal Code: The Petitioner's Application makes reference to the "City's Noise Ordinance". In addition to the Unified Development Ordinance standards, as noted above, the City's municipal code also includes nuisance standards for noise, which are typically enforced by the City's Police Department.

For reference, these standards read as follows³:

Sec. 34-51 – Prohibitions. No person shall play, use or operate any machine or device for the producing or reproducing or sound, including, but not limited to, loudspeakers, radios, CD players, television sets, musical instruments, phonographs, cassette players or any other machine designed or intended to produce or reproduce sound, not operate any

² As referenced by the fourth Condition of Approval, which would apply regardless of the condition because no variance of development standard was obtained, reads "[t]he Shooting Academy shall comply with the Westfield-Washington Township Zoning Ordinance's Performance Standards for Industrial Districts, as amended."

³ Chapter 34-51; Article II Nuisances; Division 2 – Noise of the City's Municipal Code of Ordinances.

motor vehicle that contains a modified or defective exhaust system, if such machine, device or vehicle is located in or on any of the following:

- 1) Any public property, including any public right-of-way, highway, building, sidewalk, public space, park or thoroughfare and the sound generated therefrom is clearly audible 40 feet or more from its source, or is at a level of 90 decibels or more when measured from a distance of not less than six feet from its source; or
- 2) Any private property and the sound generated therefrom is clearly audible 40 feet or more outside of said private property line, or is at a level of 90 decibels or more when measured from a distance of not less than six feet from said private property line.

Sec. 34-52. - Exemptions. The following are exempted from the provisions of this subchapter:

- 1) Sounds emitted from authorized emergency vehicles.
- 2) Lawn mowers, garden tractors, construction equipment, and power tools, when properly muffled, between the hours of 7:00 a.m. and 10:00 p.m. only.
- 3) Burglar alarms and other warning devices when properly installed, providing the cause for such alarm or warning device sound is investigated and turned off within a reasonable period of time.
- 4) Parades, festivals, carnivals, fairs, celebrations, concerts, artistic performances or other events authorized by the city council or another appropriate governmental entity.
- 5) Attendant noise connected with the actual performance of athletic or sporting events and practices related thereto.
- 6) The emission of sound for the purposes of alerting persons to the existence of an emergency, or for the performance of emergency work.
- 7) Sounds associated with the use of legal fireworks.
- 8) Sounds associated with the use of an approved public safety training facility between the hours of 7:00 a.m. and 10:00 p.m.
- 9) Sounds associated with the normal conduct of legally established non-transient businesses when such sounds are customary, incidental and within the normal range appropriate for such use.

Compliance with Conditions of Approval: As of the filing of this petition, the muffled sound of discharging firearms could readily be heard from adjacent properties. The Department determined the Shooting Academy was not designed and operated to prevent sound from leaving the building, as stated in the Petitioner's Narrative (Exhibit B of the Acknowledgement of Variance).



In order to comply with the condition, as currently written, changes to the operation of the Shooting Academy or further modifications to the building's design would be necessary.

MODIFICATION OF CONDITION

The Petitioner has indicated they believe the sound limit for the Shooting Academy, as summarized herein, is unclear and that a more concrete standard would be appropriate. In addition, the Petitioner has presented they believe it is not practical for no sound to leave the building.

As a result of the completion of the vestibule construction and the subsequent sound testing, the Petitioner has modified their requested Modification of Conditions as stated in the attached **Exhibit 12**. The initial modifications "clean-up" the narrative to reflect what was actually constructed and approved by the Plan Commission. The last modification in **Exhibit 12** is the modified concrete standard that is being requested, which reads:

"The sound levels from the Shooting Academy operations shall not exceed seventy (70) Decibels, as measured from the Property's Lot Line, which sound level is lower than the Unified Development Ordinance Performance Standards governing sound pressure levels for any operation or plant in the Enclosed Industrial District."

PROCEDURAL

Public Notice: The Board of Zoning Appeals is required to hold a public hearing on its consideration of this petition. This petition received its public hearing at the March 10, 2015, Board of Zoning Appeals meeting. Notice of the public hearing was properly advertised in accordance with Indiana law and the Board of Zoning Appeals' Rules of Procedure.

Conditions: The UDO⁴ and Indiana Code § 36-7-4-918.4 provide that the Board of Zoning Appeals may impose reasonable conditions and limitations concerning use, construction, character, location, landscaping, screening, and other matters relating to the purposes and objectives of the UDO upon any Lot benefited by a variance as may be necessary or appropriate to prevent or minimize adverse effects upon other property and improvements in the vicinity of the subject Lot or upon public facilities and services. Such conditions shall be expressly set forth in the order granting the variance.

Acknowledgement of Variance: If the Board of Zoning Appeals approves this petition, then the UDO⁵ requires that the approval of the variance shall be memorialized in an acknowledgement of variance instrument prepared by the Department. The acknowledgement shall: (i) specify the

⁴ Article 10.14(I) Processes and Permits; Variances; Conditions of the UDO.

⁵ Article 10.14(K) Processes and Permits; Variances; Acknowledgement of Variance of the UDO.



granted variance and any commitments made or conditions imposed in granting of the variance; (ii) be signed by the Director, Property Owner and Applicant (if Applicant is different than Property Owner); and (iii) be recorded against the subject property in the Office of the Recorder of Hamilton County, Indiana. A copy of the recorded acknowledgement shall be provided to the Department prior to the issuance of any subsequent permit or commencement of uses pursuant to the granted variance.

Variance of Use: The Board of Zoning Appeals shall approve or deny variances of land use from the terms of the UDO. A variance of land use may be approved under Indiana Code § 36-7-4-918.4 only upon a determination in writing that:

1. The approval will not be injurious to the public health, safety, morals, and general welfare of the community;
2. The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner;
3. The need for the variance arises from some condition peculiar to the property involved;
4. The strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought; and
5. The approval does not interfere substantially with the Comprehensive Plan.

As part of the approval of the Shooting Academy's Variance of Use, the Board of Zoning Appeals adopted the written findings of fact recommended in the 1304-VU-01 Department Report (see Exhibit 6).

DEPARTMENT COMMENTS

The Board is being requested to vote on whether a modified condition (as stated in Exhibit 12) related to sound is appropriate for the subject use.

Since the public hearing on March 10, 2015, the petitioner has made several improvements (as outlined herein) in an attempt to reduce the sound produced by the subject use. As a result of the completion of improvements and subsequent sound testing, the Petitioner has modified their requested Modification of Conditions (see Exhibit 12). The initial modifications listed in Exhibit 12 "clean-up" the narrative to reflect what was actually constructed and approved by the Plan Commission. The last modification in Exhibit 12 establishes the proposed concrete standard:

The sound levels from the Shooting Academy operations shall not exceed seventy (70) Decibels, as measured from the Property's Lot Line, which sound level is lower than the Unified Development Ordinance Performance Standards governing sound pressure levels for any operation or plant in the Enclosed Industrial District.

RECOMMENDED FINDINGS OF FACT

Recommended Findings for Approval: If the Board is inclined to approve the request to modify its imposed condition of approval for the Shooting Academy, then the Department recommends the following written findings of fact related to the modified condition:

Recommended Findings for Approval:

1. *The approval will not be injurious to the public health, safety, morals, and general welfare of the community:*

Finding: It is unlikely that approving the requested modified condition would be injurious to the public health, safety, morals, and general welfare of the community because of the proposed operational and design plan. The use and property will otherwise comply with or exceed the applicable standards of the Enclosed Industrial (EI) District.

2. *The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner:*

Finding: It is unlikely the use and value of adjacent property will be affected in a substantially adverse manner. The proposed modified condition should not have a negative impact on surrounding properties because: (i) the proposed sound levels will otherwise comply with or exceed the applicable standards of the Enclosed Industrial (EI) District; and (ii) the proposed sound levels are reasonably consistent with and reasonably compatible with the character of the surrounding industrial park; and (iii) the use will only be conducted indoors and shall otherwise comply with the Unified Development Ordinance's performance standards.

3. *The need for the variance arises from some condition peculiar to the property involved.*

Finding: The shooting range use will comply with the Unified Development Ordinance; however, due to the unique nature of the use and the conditions of approval for the shooting range use previously imposed, the modified condition is warranted to reasonably regulate the maximum sound levels, which are more restrictive than those standards of the Unified Development Ordinance.

4. *The strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought.*

Finding: The shooting range use will comply with the Unified Development Ordinance; however, due to the unique nature of the use and the conditions of approval for the shooting range use previously imposed, the modified condition is warranted to reasonably regulate the maximum sound levels, which are more restrictive than those standards of the Unified Development Ordinance.

5. *The approval does not interfere substantially with the comprehensive plan.*

Finding: The Westfield-Washington Township Comprehensive Plan identifies this property within the “Employment Corridor” and “Business Park” land use classifications as part of the State Highway 32 “Highway Corridor”. As such, the proposed use is consistent with the Comprehensive Plan’s policies and objectives for these land use classifications and does not interfere substantially with the Comprehensive Plan.

Recommended Findings for Denial: If the Board is inclined to deny the request to modify its imposed condition of approval for the Shooting Academy, then the Department recommends the following written findings of fact related to the modified condition:

1. *The approval will not be injurious to the public health, safety, morals, and general welfare of the community:*

Finding: It is unlikely that approving the requested modified condition would be injurious to the public health, safety, morals, and general welfare of the community because of the proposed operational and design plan. The use and property will otherwise comply with or exceed the applicable standards of the Enclosed Industrial (EI) District.

2. *The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner:*

Finding: It is likely the use and value of adjacent property will be affected in a substantially adverse manner. The proposed modified condition would negatively impact the surrounding properties because although the proposed sound levels would meet or exceed the applicable standards of the Enclosed Industrial (EI) District, the nature and intermittence of the sound generated by the discharging of firearms are inconsistent and incompatible with the character of the surrounding business park.

3. *The need for the variance arises from some condition peculiar to the property involved.*

Finding: The existing building was specifically designed and constructed for the proposed shooting range use after the approval of the variance of use with the imposed conditions of approval. Due to the unique nature of the use and the sound generated by the discharging of firearms, the imposed condition of approval is appropriate to prohibit sound from being audible when standing outside of the building.

4. *The strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought.*

Finding: The shooting range use will comply with the Unified Development Ordinance; however, due to the unique nature of the use and the conditions of approval for the shooting range use previously imposed, the modified condition does not adequately regulate the maximum sound levels to reduce the negative impact on adjoining properties



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Exhibit 1

5. *The approval does not interfere substantially with the comprehensive plan.*

Finding: The Westfield-Washington Township Comprehensive Plan identifies this property within the “Employment Corridor” and “Business Park” land use classifications as part of the State Highway 32 “Highway Corridor”. As such, the proposed use is consistent with the Comprehensive Plan’s policies and objectives for these land use classifications and does not interfere substantially with the Comprehensive Plan.